IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 520/2004

Mrs. Ivy Muriet Fonseca, major of age,
resident of `Radiant Park' 968,
Nana Peth, Pune - 2. ..... Petitioner.

V/s.

Mr. Porus Adi Dotor,
major of age, son of Adi H. Docor,
Resident of `Perin Villa',
B.B. Borkar Road,
Alto Porvorim, Bardez, Goa. ..... Respondent.

Mr. S.D. Lotlikar, Senior Advocate with Mr. R.S. Sardesai, Advocate for the petitioner.

Mr. Anthony D'Silva, Advocate for the respondent.

CORAM : A.P. LAVANDE, J.

Date of reserving the Judgment :
14th January, 2005.

Date of pronouncing the Judgment :
20th January, 2005.

J U D G M E N T :

Heard Mr. Lotlikar, learned Senior Advocate for the petitioner and Mr. D'Silva for the respondent. Rule. Mr. D'Silva, waives notice. By consent heard forthwith.

2. By this petition, the petitioner challenges the order dated 19th August, 2004, passed by the Civil Judge, Sr. Division, at Mapusa in Special Civil Suit No. 85/2001/C.

3. The petitioner is the defendant in the above suit, filed by the respondent, inter alia, for specific performance of an agreement of sale. The petitioner herein filed an application for amendment dated 25.11.2002, inter alia, seeking amendment by way of a counter claim. The trial Court by order dated 20.12.2003 partly allowed the amendment sought for by the present petitioner. The petitioner herein preferred Writ Petition No.125/2004, challenging that part of the order passed by the trial Court, rejecting part of the amendment. This Court, by order dated 17.6.2004, passed in Writ Petition No.125/2004, allowed the petition and thereby the entire amendment including the counter claim made by the petitioner herein, was allowed. Thereafter, the respondent herein filed an application dated 22.1.2004, under Order VII, Rule 11, read with Order VIII, Rule 6-C of the Code of Civil Procedure, for exclusion of the counter claim. The petitioner filed her reply dated 31.1.2004 and after hearing both sides, the learned trial Judge passed the impugned order, allowing the application filed by the respondent herein, thereby excluding the counter claim of the petitioner/plaintiff. The petitioner assails the said order in this petition.

4. Mr. Lotlikar, learned Senior Advocate appearing for the petitioner has submitted that the reasons given by the learned trial Court for excluding the counter claim are untenable in law. The learned Counsel further submitted that while passing the impugned order, the learned trial Judge has exercised the jurisdiction illegally and the impugned oder discloses error of law, apparent on the face of the record. It is further submitted that the finding of the learned trial Court that the reliefs sought by the petitioner by way of an amendment cannot be permitted in the counter claim, preferred by the petitioner, is patently illegal and as such, deserves to be set aside. The learned Counsel further submitted that the entire amendment having been allowed pursuant to the order passed by the trial Court and this Court, no case is made out by the respondent herein for exclusion of the counter claim made by the petitioner. It is further submitted that the amendment having been allowed, it cannot be said that the counter claim was made after the issues were settled in the suit inasmuch as the additional issues are required to be framed in view of the amendment made by the petitioner.

5. Per contra, Mr. D'Silva, learned Counsel appearing for the respondent has submitted that no fault could be found with the order passed by the trial Court, since the trial Court has exercised the jurisdiction in terms of law. He further submitted that this is not a fit

case in which this Court should set aside the impugned order in exercise of writ jurisdiction, since the jurisdiction to interfere with such type of orders is very limited. It is lastly submitted that the impugned order is in terms of law and, therefore, the petition deserves to be dismissed.

6. I have considered the submissions made by the learned Counsel appearing for both sides. The trial Court has held that the petitioner has to file a separate suit for the reliefs of declaration and mesne profits sought for by the petitioner herein and this relief cannot be granted in the counter claim made by the petitioner. By the amendment which has been allowed, the petitioner has sought for a declaration and mesne profits against the petitioner herein on the ground that the petitioner has been illegally dispossessed from the suit property. In view of this factual position, whether the petitioner is ultimately entitled to the relief, is a question to be decided by the trial Court after appreciating the evidence led by both the parties. In order to avoid multiplicity of proceedings, it would be just and proper if the counter claim made by the petitioner is also decided along with the suit filed by the respondent herein. No prejudice would be caused to the respondent herein if the counter claim made by the petitioner herein is taken up along with the suit filed by the respondent against the petitioner. As stated above, whether the petitioner is entitled to the reliefs claimed by way of a counter claim, is a matter to be decided on merits, considering the evidence and the legal

position, after the parties lead evidence in the matter. In so far as the court fees are concerned, the trial Court is free to decide whether the petitioner is liable to pay the the additional court fees and the trial Court, after giving opportunity to both sides, is free to decide whether additional court fee is payable by the petitioner herein in respect of the counter claim made by the petitioner.

7. In view of the above discussion, the petition is allowed, the impugned order dated 19.8.2004, passed by the trial Court is quashed and set aside and the trial Court is directed to consider the counter claim along with the suit filed by the respondent herein. Rule is made absolute in the aforesaid terms. In the facts and circumstances of the case, the parties are directed to bear their own costs.

A.P. LAVANDE, J.

ssm.